BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

The Board's decision (R. I, 238-275) appears in 24 N. L. R. B. No. 41. The opinion of the court below (R. IV, pp. 42-57) is not yet reported.

Reference is made to the foregoing petition for a statement of the grounds on which the jurisdiction of this Court is invoked (p. 2) and for a statement of the case (pp. 2-6).

SPECIFICATION OF ERRORS

The errors upon which petitioner will urge if the writ of certiorari be granted are that the Circuit Court of Appeals for the Seventh Circuit erred:

(1) In enforcing the Board's order and in failing to set aside such order;

(2) In failing and refusing to set aside the Board's order on the ground that the Board's findings and order are based upon an erroneous interpretation of the National Labor Relations Act and a misconception of the duties and powers of the Board thereunder;

(3) In enforcing the Board's order, and holding in effect, that the Act confers upon the Board power to determine, by indirection, the positions which an employer may take, during the course of collective bargaining, as to the substantive terms of the collective bargaining agreement

and thus to compel an employer to agree to such terms of a collective bargaining agreement as the Board shall determine;

(4) In failing to hold that the Board's findings and order are based upon a misinterpretation of the Act, to wit, that the employer and the representatives of employees, in negotiations under the collective bargaining provisions of the Act, are not possessed of equal bargaining power, but that the Board may exercise control over the positions taken by the employer in the course of such negotiations;

(5) In failing and refusing to hold that the Board's finding that petitioner refused to bargain collectively within the meaning of Section 8(5) of the Act is not supported by substantial evidence;

(6) In failing and refusing to set aside or modify the Board's order on the ground that it fails to specify what acts petitioner was required to do or to refrain from doing.

ARGUMENT

I.

THE BOARD'S DECISION IS BASED UPON A MISCONCEPTION OF THE LAW, IN THAT IT HAS CONFUSED THE ULTIMATE OBJECTIVES SOUGHT TO BE ACCOMPLISHED BY THE ACT WITH THE LIMITED POWER CONFERRED UPON THE BOARD, AND HAS ASSUMED POWER TO DETERMINE THE SUBSTANTIVE TERMS TO WHICH AN EMPLOYER MUST AGREE.

In the section of its decision entitled "Conclusions as to the refusal to bargain", the Board states that the Act "has as its objective the establishment of * * * a contractual relationship", and the Board quotes a statement of this Court, in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 236, that "The Act contemplates the making of contracts with labor organizations", and similar statements from other decisions of this Court (R. I, 262, 263).

To support the Board's decision and order by emphasis upon its ultimate objectives, without recognition of the limited means taken by Congress to accomplish those objectives, is to convert the Act from one tending to remove certain obstacles to the making of collective bargaining agreements into one providing for mediation or compulsory arbitration of labor disputes. Clearly, the ultimate objective of the Act, to establish contractual relationships and thus to remove the obstructions to interstate commerce which result from the absence of such relationships, could most effectively be accomplished by compelling agreement between employers and the representatives of their em-

ployees or, in the absence of such agreement, by compelling the parties to a dispute to submit to compulsory arbitration.

But the National Labor Relations Act does not purport to compel agreement or to provide for arbitration, although such a provision was at one time proposed (79 Cong. Rec. 7652), and does not empower the Board to act even as a mediator. The Railroad Labor Board, created by the Transportation Act of 1920, was given power to hear and "decide * * * disputes with respect to the wages or salaries of employees * * *" (41 Stat. 470; 45 U. S. C. § 139), but even that Board had no power to enforce its decisions, except by giving them publicity. Even such compulsory, but legally unenforceable, arbitration with respect to public carriers was not retained, but was superseded in 1926 by legislation creating the present National Mediation Board (44 Stat. 587; 45 U. S. C. §163), which is empowered to participate in the arbitration of disputes only upon the consent of both parties (44 Stat. 582, as amended; 45 U. S. C. § 157).

Congress has empowered the Secretary of Labor to act as a mediator, and to appoint commissioners of conciliation, in labor disputes (37 Stat. 738; 5 U. S. C. § 619). There is no provision of law, however, conferring upon any party to a labor dispute the duty of accepting any such mediation services or of complying with any recommendations made. Mediation carries with it far less control over the terms of the agreement to be reached than does arbitration, and yet the President, in approving the National Labor Relations Act, pointed out that "It should be clearly understood that it [the National Labor Relations Board] will not act as mediator or conciliator in labor disputes. The function of mediation remains, under this Act, the duty of

the Secretary of Labor and of the Conciliation Service of the Department of Labor."*

In spite of the recognized necessity for fruitful negotiation between employer and employee during the present national emergency, not even the National Defense Mediation Board, established by Executive Order No. 8716, issued by the President on March 19, 1941,** has been given the power to compel the arbitration of labor disputes.†

Comparison of the National Labor Relations Act with such other acts makes it increasingly plain that the requirement that an employer "bargain collectively" was not intended to confer upon the Board power by indirection to act as mediator or arbitrator of disputes as to the substantive terms of collective bargaining agreements.

The Board has not expressly asserted in its decision that it has power to compel agreement, or to arbitrate or to act as mediator. Yet it has attempted to support its decision and order by an emphasis upon the ultimate objective of the Act which disregards the limited means adopted to accomplish that objective, and also by a purported analysis of the nature of the duty to bargain which is clearly intended to suggest that it is the duty of the employer, in collective bargaining negotiations, to "modify

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*Commerce Clearing House, Labor Law Service, Vol. I, ¶ 1501.

**Commerce Clearing House, Labor Law Service, Vol. I, ¶ 1300.

†That Board, after proper certification by the Secretary of Labor, is authorized only to "make every reasonable effort to adjust and settle any such controversy or dispute by assisting the parties thereto to negotiate agreements for that purpose; * * * to afford means for voluntary arbitration with an agreement by the parties thereto to abide the decision arrived at upon such arbitration * * *".

demands" in accordance with what the Board deems to be the "total situation", to communicate to the union such "facts peculiarly within the knowledge" of the employer as the Board deems relevant to the issues being discussed, and to engage in such "personal persuasion" as the Board deems appropriate (R. I., 263, footnote 32). In its findings of fact the Board extends its doctrine to an extreme not expressly stated in its definition and analysis of the duty to bargain, and predicates its decision that petitioner refused to bargain collectively solely upon evaluations made in the Board's decision of the positions which petitioner took as to the substantive terms of the collective bargaining agreement and the reasons advanced by it in support of such positions.

The Board's findings as to the alleged refusal to bargain consist of three parts: "1. Chronology of events" (R. I, 243-246); "2. The course of negotiations" (R. I, 246-262); and "3. Conclusions as to the refusal to bargain" (R. I, 262-272).

The findings as to "The course of negotiations" purport to review the positions taken, and the reasons advanced for them, by petitioner and the union, with respect to the following subject-matters: "Duration"; "Wages"; "Hours"; "Seniority"; "Paid holidays, vacations and bonuses"; and "Discrimination, strikes and lock-outs". The findings entitled "Conclusions as to the refusal to bargain" purport to review, analyze and appraise the facts previously set forth, and to draw inferences and conclusions therefrom.

As to "Wages", the Board finds that petitioner demanded a 10% reduction, urging as grounds therefor that it had never reduced wages since 1920; that it had increased

wages twice in 1937, once by 5% and once by 10%; that the wages paid by it were far above those paid for similar work in other competing plants; that it had made no profit on its American operations in 1937; and that salaries, as contrasted with wage rates, had been reduced (R. I, 249, 251-252).

The Board, disregarding the obvious significance to any wage problem of the extreme business recession which existed at the time the wage reduction was proposed,* criticizes petitioner's position as to wages on several grounds. First, it repeatedly criticizes petitioner on the ground that at one time during the course of negotiations it referred to the proposed wage reduction as "imperative" and yet two months later indicated that the effective date of the reduction could be determined "later" (R. I, 249, 252, 264, 269). Although the context indicates that the word "later" was used to assure the union that, if it would agree during negotiations to the reduction, it would not become effective until the negotiations were completed on other matters and a contract entered into (R. II, 360; *cf.* R. II, 341, 388), the Board apparently infers from this single word that petitioner was seeking a contract providing that the effective date of the reduction should be determined only after the contract was entered into.

Secondly, the Board criticizes petitioner's position on wages on the ground that the petitioner refused to accede

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*See, *e.g.*, the business index in the financial section of any Sunday edition of the New York Times, which shows a decline from 109 to 78 from the fall of 1937 to the summer of 1938—a decline more severe than took place during any like period during the recession from 1929 to 1932 and equal to two-thirds of that recession. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 301.

to a request of the union to permit a government accountant to inspect its books in order that the union might be "satisfied of the existence of the facts" (R. I., 249, 252, 265), and that petitioner did not offer "evidence" that the reduction was "necessary" or that "business necessities required the wage clauses which it proposed" (R. I, 252). Thirdly, the Board emphasizes that, when the wage reduction was first proposed, the union promptly voted to call a strike if the reduction were put into effect (R. I, 249), and that petitioner therefore knew that the employees "had manifested their strong opposition" to the reduction (R. I, 263).

The Board also states that petitioner's original proposal as to wages provided that petitioner might institute further wage reductions at its discretion (R. I, 250). The Board recognizes, however, that petitioner subsequently withdrew its original proposal and proposed instead that the contract provide that petitioner should give two weeks' notice of any proposed reduction and should negotiate with the union on the matter if requested to do so (R. I, 252). In its "Conclusions" the Board places no emphasis on this aspect of the wage matter (R. I, 263), and the great emphasis given to it by the court below appears to be predicated upon a misunderstanding of the Board's decision.*

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*The court below states, "But the employees had the right also to include in the contract a proper clause recognizing the right to bargain collectively as to wages. * * * The Board itself suggested * * * that it believed the circumstances such that * * * they indicated upon the part of petitioner * * * a further intent to refuse to include in any contract a proper bargaining clause as to wages" (R. IV, 52).

We find no such suggestion in the Board's decision. Indeed, there is no evidence, and no finding by the Board, that the union ever objected specifically to petitioner's original proposal as to

Wages are, of course, the most important single subject matter in collective bargaining negotiations, and without agreement as to wages it is doubtful whether any agreement at all can be reached. In this case the employer and the union both stood upon the positions originally assumed (R. I., 249-250; II, 442, 447), as each had a right to do.

As to "Hours", the Board finds that it was "uncommon"* for petitioner to pay any overtime, but that petitioner first proposed to pay overtime for work in excess of a 9-hour day or a 49-hour week, and that later, upon enactment of the Fair Labor Standards Act (52 Stat. 1060; 29 U. S. C. § 201), petitioner proposed an agreement, pursuant to Section 7(b) of that Act, that no employee be employed more than one thousand hours during any twenty-six consecutive weeks, and that overtime be paid as provided for by that Act where such an agreement has been made with a duly certified labor union (R. I, 253).

The Board's primary criticism of petitioner's position on this matter is that petitioner failed "to demonstrate to the United that the 'necessities' or 'emergencies' of its business required the concession which it sought as to overtime" (R. I, 265). The Board fails to point out in its decision that, in view of petitioner's policy, based on business necessities, not to pay overtime, the result of rejection of petitioner's proposal would be that no employee would receive any work in excess of the hours after which overtime would begin (R. II, 370, 390-391). It also does not point out in its findings that it was expressly recognized

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further wage reductions—the discussions of the wage matter having been confined to petitioner's proposal for immediate reductions to be provided for in the contract.

*The evidence showed that petitioner had paid overtime only to certain maintenance employees (R. 489, 499).

by both the petitioner and the union that, if the union did not agree to petitioner's proposal, petitioner would pay overtime in accordance with the Fair Labor Standards Act, which provided for the same overtime provisions as those which were demanded by the union (R. II, 360, 390, 391). There is no finding by the Board that the petitioner made the acceptance of its proposal as to hours and overtime a condition precedent to the making of a contract (see R. II, 360, 390-391).

As to "Seniority", the Board finds that the union demanded strict seniority in retaining and rehiring employees, based upon length of service, and that petitioner demanded that the primary considerations be ability and fitness for the work, value to petitioner and family status (R. I, 254-256). Although the union's local officers repeatedly recognized, both expressly and tacitly,* that petitioner's previously existing practice was to take into consideration those factors, the Board criticized petitioner's position on this issue primarily on the ground that it "offered the United no evidence in that regard" (R. I, 256) when at one of the conferences an international representative of the union from New York City, who was present only at that one conference, indicated that he did not know whether seniority was the existing policy, but stated that he would "take the word of the company" (R. I, 79, 94-95; II, 386).

As to "Paid holidays, vacations and bonuses", the Board finds that petitioner had since 1936, i.e., for two years, granted its employees seven holidays with pay, one week's vacation with pay, and a bonus at Christmas, but

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*(R. II, 478-479; I, 94-95; II, 346, 350, 374-375, 379-381.

that petitioner refused a proposal of the union that petitioner's "present policy" be "embodied" in the contract, (R. I, 256-258), which the union insisted be of at least one year's duration (R. I, 246-248; II, 443). The Board criticizes petitioner on this issue primarily on the ground that it failed to "demonstrate" to the union that the "necessities of its business" prevented it from agreeing contractually that it would in the future grant such holiday and vacation pay and such bonuses as it had in the previous two years, and that petitioner wished such payments to be "in the nature of a gratuity to its employees" (R. I, 257-258, 265-266, 269-270, 271). It also appears from the Board's decision, however, that the latter contention was merely urged in petitioner's brief before the Board (R. 258, footnote), and petitioner recognized at the hearing that these matters were appropriate subjects of collective bargaining (R. II, 392-393).

As to the "Duration" of the proposed contract, the Board finds that, while the union demanded that the contract continue from year to year unless terminated at the end of any year on 30 days' notice by either party, petitioner demanded a contract of indefinite duration, terminable upon 30 days' notice by either party, urging that its proposal had "the advantage of doing away with definitely recurring periods of negotiations and leaves both sides free to negotiate at any time in view of changed circumstances" (R. I, 246-248). The Board reviews the positions of the parties and the reasons advanced by them on this issue at length, but in its "Conclusions" it refers to the course of negotiations on this issue only by emphasizing, in connection with its criticisms of petitioner's positions on other subject matters, that petitioner was demanding a contract

of only 30 days' duration (R. I, 257, 265, 266), a consideration urged in disregard of the union's continued insistence upon an initial duration of one year.*

As to "Discrimination, strikes and lock-outs", the Board finds that the union demanded provisions substantially in the language of Section 8(1) and 8(3) of the Act and a provision that petitioner would engage in no lock-out, and that petitioner, while refusing to accede to such proposals, requested a provision forbidding any strike until the procedure for adjustment of grievances provided for in the agreement had been exhausted, and forbidding any sympathetic strike, or any "stay-in, slow-down, sit-down" or other interference with work on the Company's premises (R. I, 258-262). Petitioner's rejection of the union's proposals is criticized on the ground that such clauses as the union sought are "not unusual in collective bargaining agreements" and "tend to realize the purposes of the Act", and that petitioner's objections to such clauses on the ground that they merely bound petitioner contractually to obey the law were "patently specious", since the union's purpose "was simply to give the employees a feeling of security" (R. I, 266). On the other hand, petitioner's proposals are criticized primarily on the ground that, in view of the petitioner's rejection of the union's proposals, they would have placed the union in an "inferior position" (R. I, 267).

It is solely upon the basis of its criticisms of petitioner's positions upon these various subject-matters, and of inferences as to petitioner's state of mind and purpose drawn

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*The Board also disregards in its decision the fact that petitioner subsequently stated that its position on duration should not be a "stumbling block" if the union could not bring itself to see the matter in petitioner's way (R. II, 449).

solely from the conduct thus criticized, that the Board has based its conclusion that petitioner refused to bargain "in good faith" and thereby violated the Act (R. I, 268-272).

Whether or not those criticisms are valid, the Board's decision is thus clearly predicated upon an assumption of power by the Board to hold an employer guilty of an unfair labor practice if he takes positions, or advances reasons in support of them, which the Board deems to be unreasonable or subject to valid criticism, and the Board's order, although phrased in the general language of Section 8(5) of the Act, is clearly an assumption of power to require an employer tc change its conduct in respects in which the Board finds it to be unreasonable or open to criticism.

Thus, it appears from the Board's own exposition of the duty to bargain in good faith, from its attempt to find support for its position in the ultimate objective of the Act to bring about collective bargaining agreements, from its findings and reasoning with respect to the facts, and from its order, that the Board's decision is based upon a misconception of the law, in that the Board has confused the ultimate objective of the Act to bring about collective bargaining agreements with the limited power conferred upon the Board to prevent certain defined practices, and that by its decision and order the Board has assumed power to determine the substantive terms to which an employer may agree.

The Board will, of course, disclaim any such interpretation of the Act or any such purpose. That the court below interpreted the Board's decision as we have, however, is indicated by the following excerpt from its opinion, immediately preceding its review of the various matters which are dealt with in the Board's findings (R. IV, 49) and have been reviewed briefly above:

> "Petitioner's expressed attitude upon each of the controverted questions remained the same for the entire period. The record fails to disclose any attempt upon its part so to modify its demands as to meet any of the proposals of the union upon any of the matters discussed."

The court below, like the Board, thus based its decision upon the assumption that an employer has failed to bargain, within the meaning of the Act, if it maintains the same attitude with respect to the controverted subject matters involved in negotiations and fails to "modify its demands" so as to meet the proposals of the union. No such correlative duty to yield is, of course, imposed upon the union, and in this case the union failed to yield on the fundamental matters in controversy, insisting to the last upon strict seniority, a strict shop steward system requiring all grievances to be handled by representatives of the union, no wage reduction, and a fixed duration of one year (R. II, 441-443).

II.

HOWEVER INTERPRETED, THE DECISION OF THE COURT BELOW, ENFORCING THE BOARD'S ORDER, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND, IF NOT, PRESENTS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT.

In *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, this Court, in upholding the constitutionality of the Act over objections grounded upon the Fifth Amendment, said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel".

This Court also said, in *H. J. Heinz Co.* v. *N. L. R. B.*, 61 S. Ct. 320, 325, "It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement", and that "The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance, and not, once it is reached, to its expression in a signed contract. * * *" And in *Phelps Dodge Corp.* v. *N. L. R. B.*, unreported (decided April 28, 1941), this Court said that the Act "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free" (p. 3).

The same limitations appear from the legislative history of the Act. In reporting the bill which became the Act, the Senate Committee on Education and Labor said (Senate Report No. 573, 74th Cong., 1st Sess.):

> "The committee wishes to dispel any possible false impression that this bill was designed to compel the making of agreements or permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement,

> because the essence of collective bargaining is that either party shall be free to determine whether or not proposals made to it are satisfactory."

Senator Wagner, in advocating the passage of the bill which became the Act, commented on the provisions which became Section 8(5) of the Act as follows (79 Cong. Rec. 7571):

> "Most emphatically this provision does not imply governmental supervision of wage or hour agreements. It does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."

Although, as we have shown, the Board purports to support its decision in this case by statements of this Court as to the ultimate objectives of the Act, its entire decision disregards the fundamental concept of the Act, expressed in the above-cited decisions and in the legislative history of the Act, and constitutes an assumption of power to compel an employer not only to bargain collectively with the representatives of its employees, but also to agree to such substantive terms and conditions of the collective bargaining agreeement as the Board deems reasonable.

It is immaterial that the Board has not expressly asserted a power inconsistent with the concept of the Act expressed in the decisions of this Court and in the legislative history, for the distinction between a power to compel bargaining and a power to compel agreement is not a mere verbal distinction, but one which recognizes a fundamental limitation upon the power of the Board. It is also immate-

rial that in its decision in the present case the Board has interposed, between its analysis and appraisal of petitioner's positions as to the substantive terms of an agreement and its ultimate conclusion that petitioner refused to bargain, findings as to petitioner's state of mind, "plan and purpose", "desire", "open and fairmindedness" and "sincerity of purpose", for such findings are predicated solely upon the previous findings purporting to analyze and appraise petitioners substantive positions.

If, on the basis of inferences as to such matters drawn solely from the substantive positions taken by the employer during the course of collective bargaining negotiations, the employer could be held not to have bargained in good faith, the Board would have power to exercise, as in this case, effective control of the substantive terms of collective bargaining agreements and power to compel an employer not only to bargain but also to agree.

In *N. L. R. B.* v. *P. Lorillard Co.*, 117 F. (2d) 921, the Circuit Court of Appeals for the Sixth Circuit held that an employer may not be held to have refused to bargain in good faith by reason of the substantive positions which he takes in collective bargaining negotiations. In that case, the court held that the employer did not, as held by the Board, refuse to bargain collectively, within the meaning of Section 8(5) of the Act, by stating in advance certain terms to which it would not accede and by submitting proposals which it stated represented its final word and to which it adhered thereafter.* The Court said (pp. 923-924):

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*In that case, the Court sustained the Board's finding that the employer refused to bargain only in that it refused to enter into personal negotiations at Middletown, Ohio, where the employees worked, and insisted that bargaining take place in New York.

> "The Board is not authorized, by statute or court decision, to shape or control the course of the negotiations between employer and employee, so long as the employer bargains collectively, in accordance with the statute. * * * The Act nowhere attempts to define what agreement shall be offered by the employer or by the union in the bargaining. In fact, as pointed out by the Supreme Court, 'The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."' National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A. L. R. 1352; National Labor Relations Board v. Sands Mfg. Co., 6 Cir., 96 F. 2d 721, 724, affirmed 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682; National Labor Relations Board v. Sunshine Mining Co., 9 Cir., 110 F. 2d 780. But if the employer is free to contract or to refuse to contract at will, he is likewise free frankly to state the terms upon which he may yield and those upon which he will not yield. * * * The sincerity of the employer's effort in negotiating with a labor organization, under the statute is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement."

The court thus recognized—in a case in which the Board's purported requirement of "willingness to modify demands in accordance with the total situation" was much more strikingly disregarded than in this case—that such standards as "good faith", "sincerity" and "desire to reach an agreement" may not be so applied as to accomplish, by

indirection, control over the substantive terms to which an employer must agree. The reasoning of the court in that case, if applied in this case, would clearly require that the Board's order be set aside.

None of those decisions which accept, as relevant to the issue of refusal to bargain, inferences drawn by the Board as to an employer's state of mind, has suggested that the Board may, by the expedient of drawing such inferences, control by indirection the substantive positions which the employer may take, or compel him to reach agreement. Such decisions have related to such conduct as outright refusal to meet with union representatives, premature termination of negotiations, refusal to meet with the union as the bargaining representative of the employees, refusal to make counter-proposals or to discuss the union's proposals, insistence upon terms which were illegal because they deprived the employees of the rights guaranteed to them by the Act, insistence that no agreement would be made on any terms, refusal to embody in a written contract agreements which had been reached, and the taking of unilateral action with respect to the terms and conditions of employment without affording the union any opportunity to negotiate.* None of such forms of conduct, which deny a union free opportunity for negotiation with the employer as to the terms of an agreement, or which impose illegal conditions

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*E.g., *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 358; *Jeffery-De Witt Insulator Co.* v. *N. L. R. B.*, 91 F. (2d) 134, 139 (C. C. A. 4), *cert. den.* 302 U. S. 731; *N. L. R. B.* v. *Express Pub. Co.*, 111 F. (2d) 588, 589 (C. C. A. 5), *reversed on other grounds*, 61 S. Ct. 693; *N. L. R. B.* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 719 (C. C. A. 3); *N. L. R. B.* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 635 (C. C. A. 4); *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, unreported, decided April 2, 1941 (C. C. A. 1).

upon any agreement, is present in this case, and in such cases the courts have expressly recognized that the Act does not confer upon the Board power to compel the employer to agree as to the substantive terms of a collective bargaining agreement.*

Even if the decision of the court below is not in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Sixth Circuit cited above, the questions presented in this case are of fundamental importance in the administration of the Labor Act and should be settled by this Court. This Court has not yet had before it any case involving the extent to which the Act limits or controls the conduct of an employer who is actually engaged in the process of bargaining with the representatives of his employees as to the substantive terms of a collective bargaining agreement. The determination of the rights and duties of the employer in the course of such bargaining is a matter of daily concern to employers and unions, and has become increasingly so as decisions of the Board and the courts have defined and enforced the Act in other respects.

The questions presented are of practical importance, and should be clarified by this Court, not only for the fundamental reasons already stated, but also because, if the Board's reasoning in this case is valid, the employer is compelled not only to bargain and to agree, but also to refrain from exercising the normal prerogatives of one engaged in a bargaining process. It is a fact of common knowledge that in any genuine bargaining the

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**Jeffery-De Witt Insulator Co.* v. *N. L. R. B.*, 91 F. (2d) 134, 139 (C. C. A. 4); *N. L. R. B.* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 637 (C. C. A. 4); *N. L. R. B.* v. *Express Pub. Co.*, 111 F. (2d) 588, 589 (C. C. A. 5); *Wilson & Co. Inc.* v. *N. L. R. B.*, 115 F. (2d) 759, 763 (C. C. A. 8).

parties take positions for trading purposes, and frequently state that they will not recede from such position under any circumstances. This fact has received specific recognition from the Board,* as well as from text book writers,** in connection with collective bargaining negotiations. It is also a matter of common knowledge that positions so taken as to certain matters to be covered in a proposed contract are frequently adhered to and insisted upon until it appears possible that, by concession upon such matters, concessions may be obtained from the other party upon other terms of the contract thought to be fundamental.

In the present case, there were many fundamental terms of the proposed contract on which the union had refused to recede. Thus, the union refused to accede to petitioner's demand for a wage reduction (R. I, 249; II, 442), and failed to propose that it would yield on wages if the petitioner would recede from other positions which it took and

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*In its brief in *Wilson & Co., Inc.* v. *N. L. R. B.*, 115 F. (2d) 759 (C. C. A. 8), the Board stated, in dismissing a contention of an employer that the union's demand had been unreasonable, that the employer's representative at the bargaining conference

> "* * * could not have been unaware of the fact that unions, like other negotiators, can often be induced to concede matters which, at the outset, are asserted to be indispensable to an accord. As the Court aptly pointed out with respect to demands made by the union in the *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5), 'the resistance in discussion may have been only strategy and not a fixed final intention.' "

**Felier and Hurwitz, "How to Deal with Organized Labor" (1937), at pp. 557-559; Daugherty, "Labor Problems in American Industry" (rev. ed., 1938) at p. 450; Lieberman, "The Collective Labor Agreement" (1939), at pp. 27-28.

which the Board found to be unreasonable, and the Board itself has suggested that if it had to deal only with the petitioner's position with respect to the reduction of wages to the level which had existed prior to the last raise, it could not on that ground alone hold that petitioner had not bargained in the manner provided by law (R. I, 269; IV, 52). Also, the union refused to recede upon its demands as to seniority (R. I, 20, 21, 52, 74; R. II, 324, 329, 340, 346, 350), although repeatedly recognizing that petitioner's proposal as to seniority embodied its practice in that regard (R. II, 478-479; I, 94-95; II, 346, 350, 374-375, 379-381). Likewise, with respect to shop stewards, the union refused to recede from its position that every grievance must be handled either by a representative of the union or by the employee and a representative of the union, and consistently refused to accept petitioner's proposal that on matters not relating to the terms and conditions of employment generally, an employee would be free, if he chose to do so, to take a grievance up in the first instance without the intercession of a shop steward (R. II, 340, 359, 368, 386-387). Clearly, it was open to petitioner to believe that the union's position on this issue would, if accepted, result in a substantial interference with the efficient operation of the plant and was insisted upon by the union only because of its desire to impress upon the employees an unwarranted feeling of dependence upon the union, even as to the minor details of employment.

Under the reasoning of the Board in this case, an employer would be obliged, at the outset of collective bargaining negotiations, to state the most favorable terms to which he would ever agree, and would be foreclosed from exercising the right of taking positions for trading purposes.

If he took trading positions on certain terms and they were of such a nature that he could not advance reasons to justify them, and if the union should not, by receding upon the other issues, give the employer occasion to recede from his trading positions, the employer would be subject to proceedings before the Board for refusal to bargain collectively.

We believe that the Act, which was designed to bring about "equality of bargaining power between employers and employees" (Sec. 1), has been improperly construed and applied in this case in such a way as to require an employer to forego the normal methods of bargaining, while leaving the union free to bargain in such a manner as it shall see fit. Although the Act was intended to be one sided in some respects, it was not intended to be one sided in its application to the conduct at the bargaining table.

III.

IN ENFORCING PARAGRAPH 1(a) OF THE BOARD'S ORDER, WITHOUT SPECIFYING IN WHAT RESPECTS PETITIONER'S CONDUCT IN FUTURE COLLECTIVE BARGAINING CONFERENCES MUST DIFFER FROM ITS PREVIOUS CONDUCT, THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AND SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Paragraph 1(a) of the order of the court below, like paragraph 1(a) of the Board's order, directs petitioner to

cease and desist from "Refusing to bargain collectively" with the union "as the exclusive representative" of defined classes of employees. Paragraph 2(a) of the decree, like paragraph 2(a) of the Board's order, directs that petitioner shall "Upon request, bargain collectively" with the union "as the exclusive representative" of such employees. Paragraph 1(b) of the decree, which is a modification of paragraph 1(b) of the Board's order, directs petitioner to cease and desist from "In any manner interfering with the efforts" of the union to "bargain collectively" with petitioner (R. IV, 58).

Thus, the only definition in the decree of what petitioner shall cease and desist from doing, or shall upon request do, must be found in the words "bargain collectively".

It must be assumed that the decree is intended to require petitioner to do acts which it has not done before or to refrain from doing acts which it has done before. As we have shown, the only acts which petitioner has done or omitted to do heretofore, and upon the basis of which the Board has concluded that petitioner refused to "bargain collectively", relate to petitioner's positions with respect to the substantive terms of the collective bargaining agreement. It would seem necessarily to follow that the order, if intended to affect petitioner's conduct at all, is intended to require petitioner in the future to take different positions than it has in the past as to the substantive terms of the agreement. Yet the order does not indicate upon what particular substantive terms petitioner must recede from its previous positions or the extent to which it must recede either on particular positions or on its position as a whole.

For example, would petitioner have complied with the decree if it acceded to the union's demand as to strict sen-

iority, and otherwise took the same positions as it has heretofore? If not, would it be sufficient if, in addition, petitioner acceded to the union's demand as to a strict shop steward system, whereby no employee could present any grievance to his immediate foreman without the intercession of a shop steward? Or, would it be sufficient if, in addition to receding on those two points, petitioner threw open its books for inspection by the union or a government accountant, and receded from its demand for a provision forbidding the union to strike without first having exhausted the adjustment procedure provided for in the agreement.

These are only a few of innumerable combinations of changes in positions that could be made. The decree gives no guide to the action which petitioner must take, and requires petitioner itself to determine at its peril what positions it may take as to the substantive terms of the agreement without subjecting itself to punishment for contempt.

The decree is, therefore, invalid because it fails to "state with reasonable specificity the acts which [petitioner] is to do or refrain from doing." *N. L. R. B.* v. *Express Publishing Co.*, 61 S. Ct. 693, 698.

In *Swift and Company* v. *United States*, 196 U. S. 375, 401, this Court said, in modifying an equity decree under the Sherman Act, "The defendants ought to be informed as accurately as the case permits what they are forbidden to do". It is a long established and well known principle of equity that, as specifically provided by an Act of Congress (38 Stat. 738; 28 U. S. C. § 383), "Every order of injunction or restraining order * * * shall be specific in terms, and shall describe in reasonable detail * * * the act or

acts sought to be restrained". See, also *In re Huntley,* 85 Fed. 889, 893 (C. C. A. 9); *Empire Machinery & Supply Corporation* v. *Groner,* 295 Fed. 645, 650 (C. C. A. 4); *New York, New Haven and Hartford Railroad Company* v. *I. C. C.,* 200 U. S. 361, 404; *McNeill* v. *Southern Railway Company,* 202 U. S. 543, 563.

In entering a decree enforcing the Board's order, as modified, without specifying either in its decree or in its opinion what petitioner is required or forbidden to do, the court below so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, and decided an important question with respect to the administration of the National Labor Relations Act in a way probably in conflict with the decisions of this Court in *Swift and Company* v. *United States, supra,* and *N. L. R. B.* v. *Express Publishing Co., supra.*

Dated May 12, 1941.

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